No. 15654

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MIMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT, JAMES MIMS.

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The Government's first argument (Appellee's Br. p. 3) is directed to the proposition that appellant is asking this Court to rewiegh the evidence below and in essence to find the facts differently. Appellant has no quarrel with the Government's proposition that an appellate court should view the evidence in a light most favorable to the Government and grant every intendment in favor of the verdict of the jury. However, it appears that the Government has misconceived the thrust of appellant's argument.

Appellant admits that the testimony of Sabbath and Barnett was sufficient to sustain the conviction of appellant and because of that very fact, appellant contends that the trial court committed prejudicial error in refusing to give an instruction on the close scrutiny that must be used by the jury in evaluating the testimony of an accomplice and a convicted perjurer.

Appellant does not ask this Court to resolve the conflict of evidence, between the Government's case and the defendant's case, in favor of the defendant. Rather, appel-

lant wishes this Court to reverse the conviction below because the conflict of the Government witnesses, *inter se,* on the most important points in question, to-wit: whether they actually saw appellant involved in an alleged sale of narcotics, made it imperative that the trial judge instruct the jury on the close scrutiny to be given testimony from this type witness.

On page 7 of appellee's brief, the Government attempts to distinguish one of appellant's strongest cases, that of *United States v. Levi,* 177 F. 2d 827 (7th Cir., 1949) on the ground that the actual reversal was based on an improper question about a prior conviction asked by the United States Attorney. Appellant cannot agree with this distinction in view of the strong language used in the Court's opinion 177 F. 2d at page 831, cited in appellant's opening brief on page 21. Appellant has the impression that if the case at bar were one in which reversal was requested on the ground that an improper question about a prior conviction was asked, and cited *Levi* in support thereof, Government counsel would distinguish the *Levi* case on the ground that the actual point that decided the case was the lack of an adequate jury instruction on the scrutiny with which an accomplice's testimony must be viewed.

On page 8 of appellee's brief, Government counsel makes a statement which cannot go unanswered. Government counsel states:

> "The fact that the jury was informed of Miss Barnett's prior perjury conviction (C. T. p. 136, lines 19-23) almost precludes the possibility of any prejudice resulting from her testimony *according to authority which has received the Supreme Court's stamp of approval.* Hilliard v. U. S., 121 F. 2d 992 (4th Cir., 1941) cert. den. 314 U. S. 627."

It can never be stated frequently enough that denial of certiorari by the United States Supreme Court can never imply approval of the decision for which review is sought or of its supporting opinion. As Mr. Justice Frankfurter has stated as recently as December 9, 1957:

> "Although the Court has definitely decided that the denial of a petition for certiorari carries no legal significance, Brown v. Allen, 344 U. S. 443, 489-497; 97 L. Ed. 469, 489-510; 73 S. Ct. 397, both in briefs and lower courts in their opinions continue to note such denials by way of reconsidering the authority of cited lower court decisions. It has therefore seemed to be appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of a decision for which review is sought or of its stated opinion." . . . *Elgin J & E Ry. v. Clarion Vern Gibson,* 355 U. S. —, 2 L. Ed. 2d 193 (1957).

And in final reply to Government's brief, appellant strongly controverts the statement made on page 10 thereof that "the facts are clear that Mims was observed by Agent Richards taking an active part in the sale of a half ounce of heroin" [R. T. p. 28, line 7, to p. 30, line 12].

A reading of the cited testimony will show that in fact Agent Richards did not see Mims taking an active part in the sale of the half ounce of heroin. All that testimony will show is that Agent Richards saw Mims and Sabbath in conversation. On cross-examination, it is clearly brought out that Agent Richards heard none of the conversations between Mims and Sabbath and saw no package passing between Sabbath and Mims.

The testimony in the reporter's transcript from page 55, line 25, to page 56, line 12, shows exactly what Agent Richards saw and heard; that testimony is as follows:

"Q. While Sabbath was up there at the end of the hall, did you see or could you hear what they were talking about? A. I couldn't . . .

Q. Their backs were to you, is that true? A. All I saw were the two men down there. I don't know just whether they were facing me or not.

Q. You don't know what was going on? A. No.

Q. What the conversation was about? A. No, sir.

Q. Did you at any time see Mr. Mims give to Mr. Sabbath any package? A. No, sir."

From the above testimony, it can be seen that the only acts that Agent Richards could testify to concerning the appellant Mims were what seemed to be innocuous acts and it is submitted were innocuous acts. The testimony that makes these innocuous acts turn criminal is that of the accomplice Sabbath. (Miss Barnett's testimony being completely false). He is the one who said that this so-called conversation in the hall concerned a narcotics transaction. He is the one who has much at stake in the outcome of this trial. Sabbath and Barnett's testimony should have been scrutinized by the jury with extreme care. And it is because of their testimony the Court was required to give a cautionary instruction, and its failure to do so, it is submitted, was reversible error.

Wherefore, appellant prays that this Honorable Court reverse the judgment below and grant appellant a new trial.

Respectfully submitted,

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By ROBERT BARNETT,

Attorneys for Appellant.